No. 08-1363

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SUPREME COURT, U.S.

In The Supreme Court of the United States

JOHN ARTER NARRON, III,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NORTH CAROLINA

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Question Presented is:

DOES THE STATUTORY LANGUAGE "THE RESULTS OF A CHEMICAL ANALYSIS SHALL BE DEEMED SUFFICIENT EVIDENCE OF A PERSON'S ALCOHOL CONCENTRATION" CONSTITUTE A MANDATORY PRESUMPTION VIOLATIVE OF A PERSON'S DUE PROCESS RIGHTS SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ARGUMENT 1

I. The Relationship Of The Proven Fact To The Presumed Fact Is Not A Part Of This Court's Due Process Analysis Of Conclusive Presumptions In *Sandstrom*, *Francis*, Or *Carella* 1

II. The Presumption In The Present Case Does Not Merely Codify A Matter Of Law For The Jury 6

III. Because The Statute Is Applied At The First Tier Trial Court Where Most Driving While Impaired Offenses Achieve Resolution, Both The Statutory Language And The Jury Instruction Derived Therefrom Must Be Addressed 9

IV. Respondent's Initial Argument At The Trial Court And The Court Of Appeals Reveals The Purpose Of This Legislation And The Intended Interpretation By North Carolina Courts 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Carella v. California,
491 U.S. 263 (1989) 4, 5

County Court of Ulster v. Allen,
442 U.S. 140 (1979) 1, 2, 3, 4

Francis v. Franklin,
471 U.S. 307 (1985) 4, 5

Leary v. United States,
395 U.S. 6 (1969) 1

Sandstrom v. Montana,
442 U.S. 510 (1979) 2, 3, 4

State v. Narron,
666 S.E.2d 860 (N.C. App. 2008) 7, 8

State v. Shuping,
312 N.C. 421 (1984) 7

United States v. Gainey,
380 U.S. 63 (1965) 1

United States v. Romano,
382 U.S. 136 (1965) 1

Ward v. Village of Monroeville, Ohio,
409 U.S. 57 (1972) 10

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV 1, 6, 10, 13

STATUTES

N.C.Gen.Stat. § 7A-272 9

N.C.Gen.Stat. § 7A-290 9

N.C.Gen.Stat. § 20-138.1(a)(2) 1

OTHER AUTHORITIES

Brief for the State, North Carolina Court of Appeals,
No. COA08-129, filed May 7, 2008 12

Transcript of Proceedings taken in Pitt County Superior Court,
February 12, 2007. Karen M. Nethercutt, CVR 11

ARGUMENT

From the beginning, Respondent's stated basis for finding the language of N.C.Gen.Stat. § 20-138.1(a)(2) constitutional urged a reading that no presumption exists because the scientific test result is not merely proof of the element but the element itself. The brief in opposition now abandons Respondent's previous arguments and forces further analysis of this Court's precedent.

I. The Relationship Of The Proven Fact To The Presumed Fact Is Not A Part Of this Court's Due Process Analysis Of Conclusive Presumptions In *Sandstrom*, *Francis*, Or *Carella*.

This Court's line of holdings since *County Court of Ulster v. Allen*, 442 U.S. 140 (1979), is straightforward: if the language of the presumption is irrebuttably mandatory or conclusive, it violates Fourteenth Amendment due process. Before *Ulster*, this Court evaluated all presumptions using the rational connection test, finding a due process violation only if the proven fact and the presumed fact bore no rational connection with each other in the run of cases. *See e.g.*, *United States v. Gainey*, 380 U.S. 63 (1965), *United States v. Romano*, 382 U.S. 136 (1965), and *Leary v. United States*, 395 U.S. 6 (1969). The constitutionality of legislation evaluated under this standard depended "upon the rationality of the connection between the facts proved and the ultimate fact presumed." *Romano* at 139.

The brief in opposition cites this Court's holding in *Sandstrom v. Montana*, 442 U.S. 510 (1979) as an application of this standard. It is true that *Sandstrom* contained a presumption which presumed intent upon other facts insufficient to prove intent, but the conclusive nature of the presumptive language was dispositive to this Court's ruling, as has been consistent since *Ulster*. To confute Respondent's assertions necessitates a focus on this Court's analysis following *Ulster*.

In Justice Stevens' opinion of the Court in *Ulster*, a line was drawn between permissive inferences and mandatory presumptions. A permissive inference "allows---but does not require--- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," and its validity depends "on the strength of the connection between the particular basic and elemental facts involved." *Id.* at 156-157. This Court then analyzed the "far more troublesome device" of the mandatory presumption, which "tells the trier that he or they must find the elemental fact upon proof of the basic fact." *Id.* at 157. Stating that the analysis of a mandatory presumption is "logically divorced from [the] facts," this Court held it "irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction." *Id.* at 159.

Following *Ulster*, in *Sandstrom*, this Court considered the following instruction: "the law presumes a person intends the ordinary consequences of his voluntary acts." The "threshold

inquiry" in the analysis was a determination of the nature of the presumption involved---permissive or mandatory. Because the jury "was not told that they had a choice, or that they might infer that conclusion," this Court found the instruction mandatory and not permissive. *Id.* at 514-515. This Court reasoned that the jury could have interpreted this "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" and therefore conclusive. *Id.* at 517.

The instruction in *Sandstrom* violated due process because it "invade[d] the factfinding function which in a criminal case the law assigns solely to the jury." *Id.* at 523. As Respondent argues, this Court did extend its analysis to say it was possible that the presumption permitted the jury to make an assumption which all the evidence considered together does not logically establish. It was, however, unambiguous that this was an *additional* way the instruction failed due process, not the sole reason. "Because *either* interpretation would have deprived defendant of his right to the due process of law," this Court held the presumption unconstitutional. *Id.* at 524 (emphasis added).

The import of this Court's analysis in *Sandstrom* and *Ulster* is the application of a tougher standard for due process analysis of mandatory presumptions, analyzing the presumption facially and not with regard to the particular facts or the connection between the evidence and the presumed fact. It is difficult to craft a more conclusive phrase than the present statute: "shall be deemed sufficient evidence of." It is, in Justice Brennan's words in

Francis, "cast in the language of command." Indeed, the court of appeals held, and Respondent does not urge differently, that this language is mandatory and not permissive.

Respondent references a defendant's opportunity to attack the credibility or admissibility of the breath test results at trial as a sufficient safeguard. This assertion is simply inaccurate. Due process can certainly find no sanctuary in foundational safeguards of evidentiary admissibility. There is no language in the statute nor the jury instructions allowing this presumption to disappear if a defendant presents some evidence showing the state's breath-testing machine to be fallible or inaccurate.

The brief in opposition cites two more holdings by this Court, *Francis*, *Supra*, and *Carella v. California*, 491 U.S. 263 (1989), as further support of Respondent's position that the strong connection between the proven fact and presumed fact eliminates constitutional concerns. Both cases are helpful in this analysis.

In *Francis*, this Court analyzed the following instruction: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted." *Id.* at 309. Applying the standards of *Ulster* and *Sandstrom*, this Court again restated the bright-line distinction between mandatory presumptions and permissive inferences. In his opinion of the Court, Justice Brennan stated:

> An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts . . . our cases make clear that such shifting of the burden of persuasion with respect to a fact which the State deems so important that is must be either proved or presumed is impermissible under the Due Process Clause.

Id. at 317. The analysis in *Francis* expends no deliberation to the relationship of the proven fact and the presumed fact. The presumption is mandatory, therefore it violates due process.

Respondent's reference to *Carella* provides another helpful example of this Court's analysis. In that case, the judge instructed that a person "shall be presumed to have embezzled" a vehicle if it is not returned within 5 days of the rental agreement's expiration date. The analysis was straightforward: "These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses." *Id.* at 266.

In concluding that these presumptions ran afoul of due process, the holding in *Carella* does not rely on the connection between the proven and presumed facts. There is a mention of the connection of the proven and presumed facts in mentioning harmless error analysis, dicta which

doubtlessly led to the concurring opinion ("A defendant may assuredly insist upon observance of this [right to jury trial] even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State"). *Id.* at 268 (Justice Scalia, with whom Justice Brennan, Justice Marshall, and Justice Blackmun join, concurring).

This Court's rulings are lucid: mandatory presumptions that command the jury to find an elemental fact from a predicate fact impermissibly shift the burden of persuasion to a criminal defendant, which Fourteenth Amendment due process mandates must be borne by the prosecution. Such conclusive presumptions violate due process whether or not the proven fact is strong evidence of the presumed fact.

II. The Presumption In The Present Case Does Not Merely Codify A Matter Of Law For The Jury.

The brief in opposition claims a distinction between language that dictates an issue as a matter of law versus language that presumes a fact. As authority for this premise, Respondent cites three North Carolina appellate cases which uphold trial court instructions on legal issues. Without addressing the merits of any of the rulings cited, it is sufficient to say those create a distinction this Court never has, but which warrant no analysis in the present case. The presumption challenged in this case presumes a fact---alcohol concentration—which

is a core element of the offense, with proof of another fact---the state's admissible blood or breath test result.

One North Carolina case, *State v. Shuping*, 312 N.C. 421 (1984), has found a prominent place in Respondent's argument from the beginning. This is not coincidental, as the new statutory language was derived from that very ruling. *Shuping* was a defendant's challenge of the trial court's denial of a motion to dismiss an impaired driving charge (under 0.10 law, but with identical elements) after a 0.10 result was admitted into evidence. The supreme court held this sufficient evidence of a person's alcohol concentration for its submission to the jury. The standard in *Shuping* is evidence in the light most favorable to the state. It would be inappropriate and unconstitutional to instruct the jury at a stage of a trial where proof beyond a reasonable doubt is the standard with language of a lesser standard.

Respondent echoes the court of appeals' evasion of the core issue: the fact proven, the state's blood or breath test result, is separate and distinct from the element of actual alcohol concentration. The brief in opposition quotes the court's opinion, stating "the amendment does not state that 'results of a chemical analysis shall be deemed sufficient evidence to prove' e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway." *State v. Narron*, 666 S.E.2d 860 at 866 (2008). The court could have answered its own question by continuing with the language of the statute, rather than replacing it with exempli gratia.

"Alcohol concentration" is the presumed fact---the element.

Respondent is correct that the only way to determine an individual's alcohol concentration is by scientific testing. Without a presumption, this still remains strong evidence of the element. But the weight, reliability, and certititude with which to assign the rest result in each individual defendant's case must remain with the factfinder, not the legislature.

The court of appeals correctly stated that the legislature has the proper authority restrict the specific amount of alcohol a driver can have in their system while driving on the streets and highways of North Carolina. The court effervesces over the North Carolina "legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing." Undeniably, North Carolina's General Assembly has the authority to determine what scientific testing is accurate or reliable enough for admissibility at trial. But it does not follow that the same power extends to enactment of legislation that dictates the factual findings of a jury.

In straining to find due process conformity, the court concluded "the meaning of the phrase 'shall be deemed sufficient evidence to prove' is that properly admitted results of a chemical analysis 'must be treated as prima facie evidence of a defendant's alcohol concentration." *Narron* at 865. This Court has never applied a prima facie standard to either a conclusive presumption or a permissive

inference. Such analysis was flawed and must be corrected.

III. Because The Statute Is Applied At The First Tier Trial Court Where Most Driving While Impaired Offenses Achieve Resolution, Both The Statutory Language And The Jury Instruction Derived Therefrom Must Be Addressed.

Respondent's attempt to divorce the jury instruction from the statute by claiming the jury instruction was not addressed in the Petition warrants discussion. Petitioner's objections at trial and assignment of errors at the appellate level--as well as the current petition before this Court--focus on both the jury instructions and the statutory language. The instructions, cited in the petition on pages 5-6, follow this statutory language verbatim, replacing only the word "shall" with "are." The procedures governing the disposition of impaired driving charges in North Carolina courts necessitates the issue turning on the statutory language as well as the jury instruction.

North Carolina's driving while impaired offense in is a misdemeanor, punishable by up to a maximum of two years in prison. In North Carolina, pursuant to N.C.Gen.Stat. § 7A-272, the District Court Division has original jurisdiction for the trial of all criminal actions below the grade of felony. A District Court Judge is the factfinder, sitting in place of a jury. A defendant has the right to appeal to Superior Court for a jury trial de novo pursuant to N.C.Gen.Stat. § 7A-290.

This Court has previously held Fourteenth Amendment due process protections extend to first tier state trial courts. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the issue was whether the Fourteenth Amendment due process right to an impartial judge extended to Mayor's Court, where all traffic infractions were heard. This Court ruled that due process guarantees extend to such first-tier state courts created by statute, and the "procedural safeguard" of a trial de novo "does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal." *Id.* at 60. While the District Court is not a court of record, and defendant assigned error to the jury instructions on appeal, the statute itself must be addressed or defendants will be forced to appeal for de novo trials before Fourteenth Amendment due process protections will apply.

IV. Respondent's Initial Argument At The Trial Court And The Court Of Appeals Reveals The Purpose Of This Legislation And The Intended Interpretation By North Carolina Courts.

The brief in opposition marks a clear departure from Respondent's argument in state court, which asserted that the test result was not merely proof of the element but the element itself. As Respondent is seeking no further review of the

North Carolina Court of Appeals ruling in this case, and as it reveals Respondent's intended reading by our state courts of the new statute, a brief exploration of the North Carolina Attorney General's previous argument before that court is warranted.

Respondent's previous theory continued as subtle variations on an unchanging theme that the scientific test is dispositive for a conviction of impaired driving. Initially at the trial court level, counsel for Respondent admitted that the legislature, through this new statute, intended the jury not be necessary for this element of the offense.[1]

Respondent's position was just as straightforward in the brief filed with the North Carolina Court of Appeals by Isaac Avery, III, a co-author of the DWI task force legislation that became the new statute. At that time, Respondent argued that that there is not both a predicate fact and a presumed fact because "The Intoxilyzer result IS

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[1] Arguing on behalf of the Attorney General at the February 12, 2007 hearing in Pitt County Superior Court, Attorney Isaac Avery, III, argued that the North Carolina General Assembly said "when it is a .08 and it comes in [to evidence], you're guilty of that part of the offense." When asked by the Superior Court Judge presiding, "Well what's the need to have a jury trial then?" Mr. Avery responded, "Well, because you still have to prove the other elements." *Transcript of Proceedings taken in Pitt County Superior Court*, February 12, 2007. Karen M. Nethercutt, CVR.

THE ELEMENT" (emphasis included).[2] In a most revealing statement, Respondent argued the jury "cannot find an alcohol concentration was less than a 0.08 when a 0.08 is the only result shown by a valid test." *Brief for the State, North Carolina Court of Appeals,* No. COA08-129, p. 18, filed May 7, 2008.

The addition of this single sentence into the subsection defining the fourth element of driving while impaired was not for the education of a legal standard but to command the factfinder that they must follow the results of the prosecution's scientific evidence. Under the previous version of this statute, with identical elements but without the presumptive language, some judges and juries were occasionally not convinced beyond a reasonable doubt in the infallibility of the state's breath-testing machine or the methods used by the S.B.I. lab in its blood testing analysis. The "Governor's DWI Task Force" perceived this as a problem not to resolve in updating or improving the method of scientific testing but in legislation dictating convictions. Thus, the impaired driving statute was amended to

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[2] The relevant portion of the brief filed by the Attorney General reads as follows: "The General Assembly has authorized extensive public resources to assure that scientific tests using breath or blood are accurate. The Legislature did not preclude the Defednant from attacking the State's test. The Defendant can challenge its admissibility. The Defendant can also, by statute, obtain his own test. All the legislature did was to say that the amount of alcohol in a driver's system must be shown by a chemical analysis and not by improper inferences. When the Intoxilyzer result is 0.08, there is no fact presumed to prove the element. The Intoxilyzer result IS THE ELEMENT." *Brief for the State, No. COA08-129,* p. 16, filed May 7, 2008 (emphasis included in original as set out).

its present form, which constitutes an invasion by North Carolina's legislature into the sanctity of the jury.

Trial courts are instructing juries across North Carolina that the test results offered into evidence by the prosecution "are deemed sufficient to prove" the element of alcohol concentration. Juries are granted no permission to differ or disagree. This is a structural violation of Fourteenth Amendment due process. A mandatory presumption of this nature and due process cannot coexist. The issue of whether constitutional protections will remain insulated from legislative temptations to replace juries with favored scientific evidence is the concern of this case and must be addressed by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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